United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1107

b
P/S

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH CAMPERLINGO, et al.,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

Appellant's Brief

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Appellant
401 Broadway
New York, N.Y.
(212) 431-4150

J. JEFFREY WEISENFELD,
On the Brief

Dick Bailey Printers • P. O. Box K, Staten Island, N.Y. 10302 • Tel. (212) 447-5158

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UNITED STATES OF AMERICA,
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ISSUES PRESENTED

1. Whether the proof at trial established multiple conspiracies?

2. Whether the evidence linking appellant to the conspiracy was sufficient?

3. Whether the antagonistic defense presented by defendant Angley required a severance?

4. Whether the admission into evidence of proof of crimes not charged was prejudicial error?

5. Whether admission of the "Mengrone" tapes denied appellant a fair trial?

6. Whether the charge to the jury that they should presume that a person intends the natural and probable consequences of his acts, requires a reversal of the conviction?

7. Whether the failure to give timely limiting instructions on the use of the evidence of marijuana transactions was error?

8. Whether the admission of Joseph Lepore's statement violated Bruton v. U.S.?

9. Whether there was a sufficient non-hearsay basis for the admission of a co-conspirator hearsay?

10. Whether the Court's restriction of cross examination was error?

PRELIMINARY STATEMENT

Appellant Joseph Camperlingo appeals from a judgment rendered against him in the United States District Court for the Southern District of New York, on March 4, 1975. Indictment S 75 Cr. 5, superceding S 74 Cr. 620, charged twenty-nine individuals with Conspiracy (Count 1) and substantive counts from January 1, 1973, up to the date of the filing of the original indictment (June 18, 1974) in violation of the narcotics law.

Appellant Camperlingo was charged only with the conspiracy set out in Count 1 of the indictment.

Camperlingo was tried jointly with sixteen other defendants in the United States District Court for the Southern District of New York, before a jury (Carter, J.)

Camperlingo and co-defendants Angley, Capotorto, Thompson, Bertolotti, Guerra and DeLuca were convicted under the Conspiracy count. Bivens, Crea, Joseph Lepore, Vasta, Sherman, Anita Coralluzzo,

Arnold and Cimmino were acquitted. As to Greco and Spangler, the jury could not reach a verdict and a mistrial was granted.

On March 4, 1975, Camperlingo was sentenced to five years imprisonment and a committed fine of $10,000. He is presently on bail of $150,000.00.

STATEMENT OF FACTS

GOVERNMENT'S CASE

ALBERT ROSSI testified that in the fall of 1972, he sold an eighth of a kilo of heroin to John DiSalvo (160-162)*. Later, DiSalvo informed Rossi that the buyers were dissatisfied and a meeting and location were arranged. At this meeting, Rossi met Ernie Coralluzzo, Joseph Ariello and "Angelo". To settle the matter, Rossi gave Coralluzzo an extra half ounce (164). Rossi began to meet with Coralluzzo on a regular basis (164).

In February, 1973, Coralluzzo introduced Rossi to Guerra at Guerra's house. Rossi and Coralluzzo wanted to buy some drugs for their personal use. Guerra informed them that he was expecting some cocaine (165-166).

The Manita Theft

In September or October, 1972, Rossi and Coralluzzo were told by "Aldo" that he knew a doctor

*References are to the typewritten minutes of trial.

who had many connections (181).

Sometime in February or March, 1973, Rossi and Coralluzzo had several meetings with this doctor to arrange a sale of manita to be used in cutting heroin. The doctor wanted too much money, so it was decided to steal the manita. Rossi called Thomas Vasta and offered him $1000.00 to help them get and sell the manita. This was done and the sale netted $6,000.00. Rossi and Coralluzzo each got $2,500.00 and Vasta $1,000.00 (182).

The Attempted Theft From Frank Matthews

In March or April, 1973, Rossi and Coralluzzo, with the assistance of James Capotorto and Sal Ripulone attempted to steal money from Frank Matthews (347). Rossi met with Matthews at the Cellar Bar, where they discussed a sale of heroin (348). As a result of this conversation, Matthews delivered $250,000.00 to Rossi at Rossi's mother's house. A Harold Harrison brought $120,000.00 more (348). The plan was to take the money and not deliver the drugs. Matthews, however, held Capotorto as a hostage and because of this the money was returned to Matthews (351).

The Trip To Florida-Samuels

In March, 1973, Rossi went to Florida and

met with Greg Samuels (166). Samuels told him that he had a buyer for two kilos of cocaine (167). Rossi called Guerra in New York to see if Guerra could supply the cocaine. As a result of the call, James Lombardo was sent by Rossi to New York, where he picked up the drugs and brought them to Florida (168-169). This deal fell through and the drugs were returned to Guerra in New York (169).

Capotorto, Bertolotti, Thompson and Camperlingo

In June, 1973, Capotorto, Bertolotti and Thompson came to New York for a meeting with Rossi and Coralluzzo (170). Capotorto told him that four people (Capotorto, Bertolloti, Thompson and Camperlingo) had pooled their money to buy a kilo of cocaine (171-172). Rossi called Guerra, who told him that there would be a one day wait before delivery (173). The next day Guerra delivered two kilos of cocaine to Rossi at his mother's house. Rossi showed the cocaine to Capotorto, Thompson and Ripulone (174), who bought one kilo and took one on consignment (175). Rossi, Coralluzzo and Guerra split up the proceeds (175). Guerra then told Rossi that the cocaine had come from California inside a spare tire (176).

In June, 1973, Rossi and Coralluzzo went to Fort Lauderdale, Florida to collect money for the

second kilo of cocaine. Rossi called Capotorto and subsequently, met with Capotorto and Thompson. Thompson gave Rossi $5,000.00 (177-178, 320). Rossi also spoke to Bertolotti and Camperlingo at their homes (321). At one such meeting, Camperlingo told Rossi and Coralluzzo that Thompson was going to the Bahamas for a load of marijuana (324-325). Since there were some problems with the quality of this second kilo of cocaine, it was agreed that Coralluzzo and Rossi would take some marijuana and take it off the bill for the cocaine (325).

In August, 1973, Rossi met with Bertolotti, Camperlingo, Thompson, Capotorto, Louis Lepore and Dominick DiGiorgio at Camperlingo's house (327). After some delay, the marijuana was unloaded. A camper was obtained and loaded with the marijuana. DiGiorgio and Rossi drove the camper to West Milford, Connecticut to meet with Guerra and Browning. Capotorto and Louis Lepore followed in Capotorto's car (328-329). They missed Guerra and Browning in West Milford, so they drove back to New York and checked into a Holiday Inn. Lepore and DiGiorgio were sent home. Guerra contacted them, and he and Browning came to the Holiday Inn and drove the camper to West Milford. Rossi and Capotorto

followed in Capotorto's car (332). At West Milford, the six hundred pounds of marijuana were unloaded. Subsequently, Rossi and Coralluzzo distributed the marijuana to Louis Lepore, Guerra and Bivens (via Guida) (245, 331).

In September, 1973, Camperlingo called Rossi at his home in Nyack. They met at Guida's apartment (337-338). Camperlingo told Rossi that he was owed money for the marijuana. It was agreed that Louis Lepore would return one hundred twenty-five pounds to Camperlingo (339). A further meeting was held at Ferrara's Cafe, where the marijuana was again discussed (339).

Iacono-Flynn-Silverio

In July or August, 1973, Rossi went to Florida and met with Iacono, Capotorto and Browning at the B & G and the Trojan Lounge (185). Iacono told Rossi that he was receiving twenty-five hundred pounds of Columbian marijuana. Rossi said he was interested (186). Iacono also told him that he had a partner, Franklin Flynn, who had connections to get cocaine from South America (187).

At a later meeting, Rossi met Flynn and Silverio. Flynn told Rossi that he could get vast amounts of cocaine. Rossi said he would buy all the

cocaine that Flynn could get. The matter was left open.

The Bivens Favor

In June or July, 1973, Rossi met Gene Bivens at Guida's apartment (179). Rossi asked Bivens if he could do them a favor and move an impure quarter of a kilo of cocaine. Rossi gave Guida the cocaine and Guida told him that he gave it to Bivens. Rossi did not receive payment for this transaction. (180)

The Theft From Frank Lucas

In August or September, 1973, Rossi met Frank Lucas at Empire Ford in Mount Vernon. Also present were Peter Mengrone and Morris (340). Lucas told Rossi that he wanted to buy ten kilos of heroin. Rossi told him that if he had the money, he, Rossi, would get the heroin (340).

About one week after this meeting, Lucas gave Mengrone $30,000.00 for the heroin (341). Initially, Rossi made some inquiries about the availability of heroin, but within one or two days of the receipt of the $30,000.00, Rossi told Guerra that the plan was to just steal the money (346). No drugs were delivered to Lucas. There ensued a series of conversations[1] among the participants. The $30,000.00 was split up among the

1. These conversations were recorded and are designated the "Mengrone Tapes".

participants. Browning got $1,000.00; Capotorto $3,000 or $4,000; Esposito $3,000 or $4,000. $8,000.00 was set aside as expense money for a trip to Florida.

Florida-The Flynn "Rip-Off"

In August or September, Flynn called Rossi and told him that Iacono was coming to New York with a sample of cocaine (190). Rossi, Capotorto and Guida met Iacono at Kennedy Airport. They went to a motel where Iacono showed them the cocaine, which was determined to be of good quality (190-192).

In September, 1973, Flynn called Rossi and told him that more goods were ready (193). After this phone call, Rossi and Coralluzzo began to put into operation their plan to steal the cocaine from Flynn. They contacted Louis Lepore, Browning, Pearson, Angley and DeLuca to get them to go with them to Florida (193-197).

Using the money obtained from Lucas, they then flew to Fort Lauderdale and checked into two different hotels (Diplomat and Hemisphere). The day they arrived, they set up a meeting with Flynn, who gave them a sample of cocaine (201-203). The next day they (Rossi, Coralluzzo, Pearson and Lepore) met with Flynn, Iacono and Silverio at the B & G Lounge. Flynn told them that he had the cocaine, but he wanted the money "up front" (204). It was agreed that the sale would take place that evening (204). Rossi, et al, checked out of

the Hemisphere and into the Diplomat (206). Angley flew back to New York (205). That evening, Flynn and Iacono arrived at the Diplomat and went to a room selected for the sale. Silverio arrived later (207). In the room, Rossi, Coralluzzo and Browning pulled out guns and stole the cocaine and Flynn, Iacono and Silverio were tied up (207-208).

The thieves then took a limousine to West Palm Beach and got hotel rooms (212). The next day they flew back to New York (212).

The Secreting of and the Attempts to Sell the Flynn Cocaine

Before leaving Florida, Rossi had called Marilyn Greco and told her to meet him at the airport with a chauffeured limousine (212). Lepore, DeLuca, Pearson and Browning were told to pick up the suitcases with the cocaine upon arrival in New York and bring them to Rossi's mother's house (213). After arriving in New York, Rossi, Coralluzzo, Spangler and Greco went to Rossi's mother's house (213). Later, the others arrived with the cocaine, which was transferred to the limousine. Rossi, Coralluzzo, Spangler and Greco then drove to 115 Heights Drive, Yonkers, New York (214). There, a Mr. Rubin tested the cocaine and said it was very good quality (214-218). The two women went out to buy packaging equipment and afthR Rubin left, they packaged the cocaine into twenty-eight fifteen ounce packs (218-220).

They were placed in the attic of Greco's house (220). Later, ten packs were moved to the house of Coralluzzo's mother-in-law (220, 221-223). The participants were then paid in cash and cocaine (224-226).

Rubin

In September or October, Rossi again met with Rubin at Greco's home (226). Rubin indicated that he had potential buyers for the whole lot (226-227). Arrangements were made. DeGiorgio picked up two fifteen ounce packs of cocaine at Greco's home (229). Later, Rossi was paid $20,000.00 for the packs (230). Arrangements for the sale of another kilo were made, but these packs were returned; "opened", "touched" and short weighted (232).

Cimmino-Toutouian

In late September or early October, 1973, the Lepores introduced "Boots" to Rossi at Raffaela's (233-234). "Boots" told them that he had two people who would take the whole load (234). "Boots" named these two people as Phillip Cimmino and George Toutouian. Cimmino and Toutouian then came into the restaurant, sat down and introduced each other (235). Toutouian and Cimmino said they could move all the cocaine Rossi had. A price was agreed upon (236).

The following night, Rossi gave cocaine to DeLuca who delivered it to Louis Lepore (237-238). Over

the next two days, Lepore gave Rossi $20,000.00 for the cocaine (239).

In October, Rossi and Coralluzzo again met with Cimmino and Toutouian. Cimmino indicated that he was having some problems with "his people" (240-241). A week later, they met again at the Holiday Inn in Yonkers. Cimmino told them that Toutouian had a case and that they needed time to move the goods (242). No further drug sales were made to Cimmino (242).

Rossi again met Cimmino and went with him to East 77th Street, where Cimmino introduced him to Susan Sherman and Maria Marrero (243).

Guerra

At the end of September or the beginning of October, Rossi met with Guerra at Guerra's apartment in the Bronx. Guerra had been told that Rossi had cocaine and he told Rossi that he wanted a kilo (243). Rossi delivered two fifteen ounce packs to Guerra and was paid $10,000.00 (244).

Bivens-Guida

In September, 1973, Rossi met with Guida at Guida's house on Lorillard Street in the Bronx. Rossi was there to collect for the quarter kilo previously given to Guida and Bivens in June or July (248). Guida said that Bivens couldn't move that quarter unless he had more cocaine to mix with it. Rossi took a quarter

of a kilo of cocaine from Greco's home and gave it to Guida. Later, Guida told him he had given the quarter to Bivens (249).

Pearson-Cosme

Rossi first met Peter Cosme in March or April, 1973, at Inky's Fly in the Bronx. They discussed drugs and Rossi gave Cosme a sample, but nothing came of it (250).

After the return from the Flynn "rip-off", Rossi met Gary Pearson at Greco's home (250). At one meeting, Pearson told Rossi that Cosme wanted to buy a half kilo (251). As a result of this, Rossi and Coralluzzo gave Pearson and Louis Lepore a fifteen ounce pack of cocaine (251). Several hours later, Pearson returned with $10,000 and told them that he had sold the cocaine to Cosme (252).

Vasta

Rossi saw Vasta on October 24, 1973, at Rossi's birthday party at the Torreador Lounge in the Bronx. Vasta told him that he had a buyer for two or three kilos of cocaine (253). Rossi, however, told Vasta that he had no cocaine, though he really did (253).

Attempts to Move "Goods" While Rossi Was A Fugitive-October 25, 1973-November 18, 1973

On October 25, 1973, Rossi found out that

there was an arrest warrant for him in the Bronx (254). Rossi decided to flee (254). Coralluzzo, Rossi and Angley drove to an apartment in Riverdale. Rossi called Greco and told her that Spangler and Marrero were going to pick up the cocaine from her (254-255). Pursuant to directions from Rossi, Spangler and Marrero picked up the cocaine and brought it to Rossi, where it was transferred to a 1971 Toronado (256). They went up to "Ruth's" apartment to store the cocaine (256-258).

After this, Rossi and Coralluzzo spoke to "Sally Goose" and made arrangements for him to store the cocaine (258). Coralluzzo, Rossi, Angley and Spangler then drove to the New Jersey shore (260). While in New Jersey, Rossi continued to deal drugs (265). Rossi and Coralluzzo told Angley to find customers. When they were found, Angley was to get the cocaine from Sally Goose (267). Pursuant to this arrangement, Angley made several sales and brought the proceeds to Rossi (267-268, 278).

Marrero-Carey

Maria Marrero, knowing Rossi's circumstances, stated that she could move some cocaine. Rossi was introduced to "Carey" at Sherman's apartment. Carey said he could move a quarter, so they gave Marrero a quarter and she and Carey left. Later, she and Carey returned and gave Rossi and Coralluzzo some money (269).

Rossi subsequently met Carey again in Sherman's apartment. Marrero and Carey told him they could move a kilo in Boston (274). Rossi called Pat Croce and told him to bring a kilo to Marrero and go with her to Boston and sell the cocaine, but only with money up front (275). A half a kilo was sold in Boston, the money split up and the remaining half kilo stored at Sherman's home (276).

Rossi and Coralluzzo decided to split up. Rossi stayed a few days with Louis Lepore.

The Lepores

During his stay with Louis Lepore, Joseph Lepore told Rossi that he wanted a kilo (271). Coralluzzo and Croce came to Lepore's. They had a kilo with them, this was given to Joseph Lepore, who then left (273). Lepore returned and said it was no deal because the cocaine had been touched (273). This kilo was then stored in Croce's house in Tom's River, New Jersey (274).

On November 18, 1973, Rossi surrendered himself and made bail (279-280).

Carey

After the surrender, Rossi stayed for a time at Spangler's house in Tuckahoe. "Sal" and his girlfriend went there and told Rossi that Carey wanted some more

cocaine. DeLuca was given a quarter of a kilo. DeLuca met with Carey. Carey wanted the drugs with no money up front (280-282), so Rossi called off the deal (284). Eventually, the cocaine was repackaged and stored in Greco's home (287).

Arnold

Sometime after he surrendered, Rossi met with Guida and Nathaniel Arnold, whom he had met previously. They discussed a drug sale and a price was agreed upon (290). The cocaine was given to Guida, who delivered it to Arnold (290). Rossi and Coralluzzo were subsequently paid (290). They again met with Arnold at a White Castle in the Bronx (291). Arnold complained about the price, but he said he wanted an eighth of a kilo as a sample for some buyers. This was done through Guida, who paid Rossi (292-293).

Artuso-Crea

Rossi first met Vincent Artuso in May or June, 1973, at a social club on Fordham Road in the Bronx. He first met Steven Crea in May or June, 1973.

Sometime after the initial meeting, Rossi was present at Morris Park Avenue, when Coralluzzo gave Artuso three or four packets of cocaine as samples. The next day, Artuso said that the price was too high and the cocaine was not pure (295).

Rossi next saw Artuso in September or October, 1973, at the social club in the Bronx. Rossi and Coralluzzo told Artuso that they now had pure cocaine and Artuso said he could get rid of it. Rossi asked Artuso for front money. Crea, who was also present, said that anything that Artuso took, he would guarantee (296). The next day, Crea and Artuso stated that they could only come up with $20,000 front money. Rossi and Coralluzzo said this was all right. However, the following day, Crea and Artuso said they couldn't get the $20,000 so, the deal fell through (297).

In December, 1973, Rossi again met with Crea and Artuso in the Four Winds Bar in Yonkers (297-298, 302). Coralluzzo informed Rossi that he had previously had DeLuca bring two kilos of cocaine to Artuso. Rossi and Coralluzzo went to the Four Winds to collect (303-304). At the Four Winds, Artuso gave them $9,000 of the $10,000 supposed to be paid. The $1,000 difference represented a debt owed by Coralluzzo to Crea (304). Sometime in December, Artuso gave them another $5,000 (306).

Angley-Guida-Arnold

In December, 1973, Rossi was in the social club on Fordham Road, when Coralluzzo, DeLuca and Angley walked in (308). Coralluzzo said that Angley had a buyer for a kilo. This deal involved two unknown people, so Rossi and Coralluzzo said to forget it. (308) About 5:00 or

6:00 o'clock that afternoon, Guida came into the club, and informed him that with Coralluzzo's consent, Guida used Rossi's 1973 Thunderbird and went to the Throgs Neck section of the Bronx to complete a sale (309). Guida and an unknown man were in the Thunderbird, while Angley was in another car (309). In a parking lot a man entered the Thunderbird and was given a sample of cocaine. The man said that he was going for the money. With this, three or four police cars started to close in on them. Guida escaped, dropped off the unknown man in the Bronx, and proceeded back to the Fordham section of the Bronx, where he put the cocaine in his car and came to the club to tell Rossi what happened (311). Rossi then called Greco. Her son picked up the Thunderbird and she took the cocaine to her home (312).

At this time, Rossi was aware of a Federal arrest warrant. That day or the next, Guida told him that Arnold wanted to buy the cocaine (313-314). Guida picked up the cocaine from Greco's (314). During the period of time prior to his surrender to Federal authorities on December 18, 1973, Rossi received about $12,000 to $13,000 for the kilo of cocaine from Guida (316). After the surrender, Rossi made bail. After this, Rossi met with Arnold at Arnold's home. Arnold told him that he had received the cocaine and had paid Guida $17,000 or $18,000 for it (318-319).

Arnold and Rossi also discussed a sale of heroin. Rossi gave Arnold $1,200 for an ounce to be picked up by George Corrada (319-320).

GARY PEARSON testified as to how he became involved in the drug business (911-912) and how he met Coralluzzo (913). He also testified substantially the same as Rossi as to the theft from Flynn (913-935). Pearson further testified that he had sold cocaine to Cosme on several occasions and that he had given Rossi the proceeds minus his share (936-941). That upon Rossi's request, he had accompanied Louis Lepore to Lepore's brother-in-law's house in the Throgs Neck section of the Bronx for the purpose of selling a half a kilo of cocaine (1003). This transaction fell through (1003).

Pearson testified that after they returned from Florida, he participated in a sale at the Jackson Steak House involving Guida and Guerra (1005-1007). In all, Pearson stated he had had six drug transactions with Guerra from July, 1973 to October, 1973, involving heroin, marijuana and cocaine (1007). Pearson also stated that Coralluzzo told him that Rossi knew that the Lucas matter was a rip-off from the very beginning (1071).

JOHN SERRANO testified to the drug sale on December 12, 1973, involving Angley and Guida and in which Rossi's 1973 Thunderbird was used without his knowledge (1110-1125).

AGENT JESUS MUNIZ testified that he was part of the surveillance team on the December 12, 1973 drug sale. His testimony was basically the same as Serrano's and Rossi's.

AGENT JOHN DI GRAVIO testified as to Vasta's drug activities.

MARIA MARRERO's testimony was generally the same as Rossi's as to her attempts to sell cocaine with Carey, whom she identified as Arnaldo Diaz (1406-1425).

The Government also introduced hotel records, telephone records and airline records to corroborate various meetings and conversations.

AGENT GEORGE FESTA testified that on May 3, 1974, Rossi was in his office and that Rossi called someone on the phone. Festa said hello and asked if the person was "Joey". The person said yes. (1535). Festa told "Joey" that he would be down to Florida that evening. Joey told Festa to call him on May 4, 1974. Festa flew to Fort Lauderdale and called the telephone number given him by Rossi (1535). Festa introduced himself as "Joey from New York", the other party identified himself as "Joe." A meeting was arranged for that day at the Four O'clock Club (1536). At 1:10 p.m., Festa went to the arranged location and met with "Joey" and "Ray" (1537). Joey was identified as Camperlingo and Ray as Thompson (1537). Festa told them that Rossi was in jail. Camperlingo

told them that Rossi had called him from West Street. Festa asked Camperlingo if Rossi had told him that he, Festa, had some stuff available. Camperlingo said Rossi had, but that it was hard to believe because it was supposed to be one hundred fifty kilos (1537). Festa said this was a mistake, that it was fifteen kilos (1537). Festa then told Camperlingo that the stuff was in South America. Camperlingo said that he could pick it up and bring it to Miami, if he were made a partner in the deal. Festa said this was too high a price. Camperlingo then said that he didn't have to deal with Rossi and that Rossi had moved him around in a couple of deals and had burned him. He recounted how on the first deal with Rossi it did not work out well and that he had given Rossi some grass and never heard about it again. (1537-1539). Despite this, Camperlingo stated that he wanted to do business with Festa, but that he was leaving town and Festa should deal with Thompson (1539). Camperlingo explained that he was going on a grass trip and he offered it to Festa (1538-1539).

Festa and Camperlingo then discussed the problems and expenses of smuggling (1540-1541). Camperlingo then stated that he had brought in thousands of pounds of grass and coke into the United States, so there would be no problem (1540-1541). Camperlingo gave Festa a telephone number to contact Thompson (1542).

Festa returned to New York. On May 9, 1974, he called Thompson who gave him a number to reach Camperlingo (1543). Festa called this number. The person on the other end said that he didn't know Festa and that any further dealings should be cleared through "Angelo" in New York (1544). Festa said he would call back for a telephone number to reach Angelo, but this was never completed (1544).

At this point, the tapes (A-312)* of the above conversations were admitted over objection and a request for reduction of all material not in furtherance of the conspiracy (1552). The Court instructed the jury that the tapes were evidence against Camperlingo only (1548).

THE STIPULATIONS. The government offered into evidence a stipulation relating to various hotel, airline and telephone records.

Defendants' Case

JAMES ANGLEY testified that he had gone on the trip to Florida, but was unaware that the purpose was to steal drugs from Flynn. As soon as he found this out, he flew back to New York. (1856-1861).[1]

MRS. ALBERT ROSSI testified as to her husband's lack of credibility.

DR. THOMAS PETERS testified that Capotorto

*References to Appellants' Appendix are designated (A).

1. On summation the attorney for Angley conceded the accuracy of Rossi's testimony to the events in Florida, except for the participation of Angley (2429, 2430, 2438-39).

was in the hospital until June 4, 1973, and was told to stay home for two weeks after his release from the hospital (1957-1967).

STEVEN CREA testified and denied any illegal transactions or conversations about illegal transactions (2052-2060). He also testified that at the Four Winds he angered Rossi by asking him and some friends to leave, at which point Rossi told him, "This ain't the end of it" (2060).

JOSEPH LEPORE denied any involvement in the crimes charged (2096 et seq.)

AGENT FREDERICK LOUGH testified that at the arraignment of Joseph Lepore on June 19, 1974, he asked Lepore why he was involved with such a crew of people. Lepore answered, "Because I'm stupid, that's why" (2178-79).

POINT I

THOUGH THE INDICTMENT CHARGED ONE CONSPIRACY, THE PROOF ESTABLISHED MULTIPLE CONSPIRACIES. THIS VARIANCE BETWEEN INDICTMENT AND PROOF AFFECTED SUBSTANTIAL RIGHTS OF APPELLANT.

I.

In contrast to the usual narcotics conspiracy case where separate groups of importers, wholesalers, middlemen and retailers are chained together in one cooperative venture, each contributing to the success of the whole (e.g., United States v. Tramunti, No. 74-1550 (2d Cir., March 7, 1975) slip. op. at 2138; United States v. Sperling, 506 F.2d 1323, 1340-1343 (2d Cir., 1974); United States v. Borelli, 336 F.2d 376 (2d Cir., 1964) cert. denied sub nom. Cinquegrano v. United States, 379 U.S. 960 (1965); United States v. Agueci, 310 F.2d 817 (2d Cir., 1962); United States v. Bruno, 105 F.2d 921 (2d Cir., 1939), the evidence in this case clearly established multiple conspiracies.* The activities of the conspiracy involving Camperlingo had nothing to do with the several conspiracies involving Rossi and Coralluzzo to steal drugs and market them. In such circumstances, multiple conspiracies were established under Kotteakos v.

*A diagram, indicating appellant's view of the conspiracies proved, is set out as an addendum at the end of the brief.

United States, 328 U.S. 753 (1945).[2] Moreover, the variance between the indictment and proof affected the substantial rights of the appellant, Camperlingo, since he was severely prejudiced by the introduction of damaging proof concerning the wide-raning criminal activities of Rossi and Coralluzzo with which Camperlingo was not involved.

Taking the view of the evidence most favorable to the government, United States v. McCarthy, 473 F.2d 300, 302 (2d Cir., 1972); United States v. D'Avanzo, 443 F.2d 1224, 1225 (2d Cir.), cert. denied 404 U.S. 850 (1971), the proof established at least five separate conspiracies.[3]

Using the standard set forth by this Court there can be no finding other than multiple conspiracies in this case.

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2. Frequent motions to dismiss the conspiracy count on this ground were made and denied at the trial.

This Court has indicated that multiple conspiracy may be considered a species of misjoinder. United States v. Miley, No. 74-2207-10 (2d Cir., March 19, 1975) slip op. 2363, at 2390 ftnt. 11.

In light of the fact that the bulk of case law in the area speaks in terms of "multiple conspiracy" appellant has chosen to do so as well. However, appellant sees the interrelation of the two classifications.

3. The government itself viewed these transactions as involving at least two conspiracies. See, Defendant Guerra's exhibit 8 (30).

In a "chain conspiracy"[4] the government must show:

> That the success of their independent venture (adulterating and selling narcotics) was wholly dependent upon the success of the entire "chain" . . . An individual associating himself with a "chain" conspiracy knows that it has a "scope" and that for its success it requires an organization wider than may be disclosed by his personal participation. United States v. Agueci, 310 F.2d 817, 826-827 (2d Cir., 1962), cert. denied, 372 U.S. 959 (1963).

An analysis of the facts of this case will not permit a finding that the transactions here were like that outlined in Agueci.

Moreover, even under the "chain" conspiracy analysis the extreme links of a conspiracy may have elements of the spoke conspiracy. In such an event, there is more than a single conspiracy unless "the evidence of the scale of the operation permitted the inference that the persons at a particular level must have known that others were performing similar roles." United States v. Miley, No. 74-2207-10 (2d Cir., March 19, 1975) slip op. at 2389-90. United States v. Borelli, 336 F.2d 376, 383 (2d Cir. 1964), cert. denied sub nom. Cinquegrano v. United States, 379 U.S. 960 (1965).

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4. The actions of the defendants were much more like a "hub and spoke" conspiracy, with Rossi and Coralluzzo as the hub and the isolated and sporadic ventures with the various defendants as the spokes. The traditional requirement of a "chain conspiracy" is a division of labor at various functional levels-exportation from a source outside the country, importation, adulteration" and packaging, distribution and sale. This is just not found in this case.

Again, there is nothing in the scale[5] of the Rossi-Coralluzzo operation, as it touched Camperlingo, from which the required inference can be drawn.

The first conspiracy the proof established was the Rossi, Coralluzzo, and Vasta conspiracy to steal manita and sell it. It is clear that this was a complete transaction with no antecedents and no subsequent effects on anyone but the original three. It was a simple theft and disposition of the fruits of that theft. It had nothing to do with any continuing enterprise, and it did not require the efforts of anyone else to complete it. There was no indication that it required an organization, even a "loose-knit" one. United States v. Bynum, 485 F.2d 490, 495 (2d Cir., 1973) vacated and remanded on other grounds, 417 U.S. 903 (1974). Nor can it be said that it represented "regular business on a steady basis". United States v. Bynum, supra, at 495; United States v. Miley, No. 74-2207-10 (2d Cir., March 19, 1975), slip op. at 2363, 2389-90. The scope of this venture was defined only by actions of Rossi, Coralluzzo and Vasta. There is nothing which would permit an inference that anyone other than those three knew of the conspiracy. United States v. Miley, supra, at 2389-90.

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5. A simple sale of 2 kilos of cocaine of poor quality.

And last, Camperlingo was in no way affected by the success or failure of the theft. It was not a joint venture in any sense of the word.

The second conspiracy proved was the attempt to steal money from Frank Matthews. In March or April, 1973, Rossi, Coralluzzo, Capotorto and Ripulone attempted to steal money from Frank Matthews. Rossi met with Matthews and a supposed sale of heroin was arranged. But Rossi intended to not deliver any drugs, but rather just keep the money; some $370,000 delivered by Matthews and Harrison.

Again, it is clear that this was a completed transaction, beginning and ending with the original conspirators. It was a single, hit-or-miss operation. It depended on no outside assistance and required none. It was a single fraud and theft. It certainly was not part of a regular business on a steady basis, or of a scale requiring an inference of knowledge on the part of all those who had any subsequent dealings with the individual conspirators. United States v. Miley, supra, at 2389-2390. Again, Camperlingo had no stake in the outcome of the venture.

The third conspiracy established was the theft from Frank Lucas, involving Rossi, Coralluzzo, Lucas and Mengrone. This operation was of the same

nature as the two previously discussed above. Again, the language in Miley is directly on point:

> . . . there was no sufficient evidence to show that Brandt and Miley the only point of contact between the two conspiracies, were conducting what could seriously be called "a regular business on a steady basis." The scope of this operation was defined only by Brandt's resourcefulness in securing new sources of controlled substances; but his known activities were not of such a scale that the defendants . . . must have known of the involvement of (other) persons . . . United States v. Miley, supra, at 2390 (citation omitted.)[6]

The fourth conspiracy involved the Flynn theft and the attempts to sell the stolen cocaine. This is really the core conspiracy and if there is a true "chain" conspiracy in this case, it is this series of events. Of course, Camperlingo had absolutely nothing to do with this theft. He had no meeting of minds with the thieves, no joint venture and no interest in the success of the theft. Camperlingo's contact with Rossi ended prior to the Flynn theft, and at the time of that theft, or soon thereafter,

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6. The Ninth Circuit, in United States v. Baxter, et al., 492 F.2d 150 (9th Cir., 1973), cert. denied 94 S.Ct. 1945, spoke directly to the issue posed here:

> Thus, if at most, the Government proved that a particular defendant purchased narcotics from the Hernandez organization without reason to believe that his ability to do so was because of the existence of an overall conspiracy involving several retailers, the jury would not be warranted in finding that such defendant had thereby participated in an over-all conspiracy. Id. at 159.

That Court went on to analyze a number of opinions of this Court:

[Footnote continued on page 30]

Camperlingo viewed Rossi as a rip-off, because of Rossi's failure to pay for the marijuana he took from Camperlingo.[7]

The fifth, and for Camperlingo the most important conspiracy, was the one involving the sale of the two kilos of cocaine, supplied by Guerra after they came to New York from California in a spare tire. This series of events consisted of a single sale of drugs and payment.

[Footnote 6 continued]

> To the extent that Bruno (United States v. Bruno, 105 F.2d 921 (2d Cir., 1939) rev'd on other gds. 308 U.S. 287); and Bentvena (United States v. Bentvena, 319 F.2d 916 (2d Cir., 1963)) would mandate a holding that narcotics retailers, if any, who purchased from the Hernandez organization without knowledge that other retailers were a part of the operation and without reasonable cause to believe this was the case, are part of a single over-all conspiracy, they contravene Ninth Circuit precedent referred to above, and go far beyond the Supreme Court's decision in Blumenthal (Blumenthal v. United States, 332 U.S. 539 (1947). Id. at p. 159, ftnt. 9.

However, the Seventh Circuit rule is not contrary to the test set out in Miley, since both tests require a basis to infer knowledge of others performing similar roles.

7. The rest of the transactions involving Rossi and Coralluzzo can be viewed as separate acts, for purposes of this brief all the attempts to sell the Flynn goods are treated as one conspiracy.

This conspiracy was complete and finished prior to when most of the crimes charged were committed. The sale occurred June, 1973, and the last contact was September, 1973. (an attempt to obtain payment for the marijuana, given itself as payment for the cocaine). By any standard, Camperlingo's involvement was not part of any overall conspiracy. Outside of the sale of the cocaine, Camperlingo had no interest in the success of anything Rossi and Coralluzzo did. The various thefts and sales had no impact upon him and he had no stake in the venture at all. Even under the view of this case as a "chain", Camperlingo is an extreme link. Moreover, there was absolutely nothing about the purchase of two kilos of impure cocaine which would lead to an inference of knowledge of the disconnected and far ranging activities of Rossi and Coralluzzo. The two kilos of impure cocaine do not represent an operation on a scale requiring broader knowledge by Camperlingo. United States v. Miley, supra, dealt with a conspiracy, among other purposes, to sell 50,000 units of LSD for $16,500.00. This is comparable to the two kilos of impure cocaine sold here. See, United States v. La Vecchia, No. 74-2272 (2d Cir., April 4, 1975) slip op. 2741 at 2757 (concurring opinion, Mulligan, J.) There was no evidence of importation, exportation, adulteration and packaging, just the sale.

Here, the value and quantity of the drugs involved do not approach the scale established in cases such as United States v. Bynum, 485 F.2d 490 (2d Cir., 1973); United States v. Barrera, 485 F.2d 333 (2d Cir., 1973) (120 kilos of pure heroin); United States v. Arroyo, 494 F.2d 1316 (2d Cir., 1974) (several hundred kilos of pure European heroin).

The activities centering around Rossi and Coralluzzo were not even a "loose-knit" operation. They were sporatic and based upon Rossi's ability to steal drugs. This is hardly a basis for a "regular business on a steady basis". United States v. Miley, supra, at 2390.[8]

II.

Since it is clear that a variance exists between the indictment and the evidence, multiple conspiracies having been proven, the inquiry proceeds to one of whether the variance is material--that is, whether it affects the substantial rights of the accused.

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8. Finding of a single conspiracy would lead to absurd results. e.g. That Camperlingo could have been charged and convicted of the Flynn theft as well as the efforts to dispose of the stolen cocaine. Or even convicted of the Lucas or Matthews transactions. In light of the general verdict by the jury, it is impossible to know of just what acts Camperlingo was convicted.

Berger v. United States, 295 U.S. 78, 82 (1935); United States v. Agueci, supra; United States v. Miley, supra.

In United States v. Berger, 73 F.2d 278, 280 (2d Cir., 1934) rev'd on other gds., 295 U.S. 78 (1935), this Court discussed what would affect substantial rights sufficiently to make the variance material and require reversal. Specifically, this Court wrote that the variance would be material where surprise hampers the presentation of the defense or where, as in the present case, "it will allow the production of evidence not competent or material to the crime he had committed."

Here, there was a staggering amount of evidence relating to the actions of others, which could not properly be attributed to Camperlingo. The various thefts, drug sales and the distribution of the proceeds of these crimes were all explicitly placed before the jury.

This Court's requirement of a showing of specific prejudice to require a new trial, is unwarranted.

In United States v. Miley, supra, this Court cited Berger v. United States, 295 U.S. 78, 82 (1935), for the proposition that where multiple conspiracies were proved the true inquiry becomes were substantial rights of the accused affected.

This is correct, but this general language does not mean that there must be a specific showing of testimonial or evidentiary prejudice. All that Berger stands for is that where the appellants are members of the core conspiracy which was proved at trial, the variance is not fatal; despite the introduction of evidence of other disconnected conspiracies. United States v. Baxter, 492 F2d 150, 160 (9th Cir. 1973) cert. den. 94 S.Ct. 1945.

Here, there was no evidence to show that Camperlingo was a member of the core conspiracy. Mainly because he was not. Under the circumstances, because of the vast amount of evidence about the core conspiracy, the variance was prejudicial and the conviction should be reversed.

Here, the jury was charged that if more than one conspiracy was proved the defendants were to be acquitted. Thus, the jury's verdict reflects a finding of a single conspiracy. Under this finding and the charge given, the jury was permitted to view all the evidence as being evidence against each defendant. In light of the general verdict, it cannot be deduced just what the jury considered as evidence against Camperlingo. For example, the jury may not have believed that Rossi and Camperlingo conspired as to the sale of

the two kilos of cocaine. They may have felt that Camperlingo was involved in some way with Rossi; such as the marijuana transaction. The ample proof of the other conspiracies were, therefore, attributable to Camperlingo and he was convicted. It is very dangerous to speculate as to the basis of a jury verdict under any circumstances. Here, where the verdict is a general one and the charge is conspiracy, with a multitude of co-defendants, such a practice should be employed only with extreme caution. cf United States v. Rosner, No. 74-2290 (2d Cir., April 29, 1975), slip op. 3245 at 3257.

An alternative ground for a finding of prejudice is the spill-over effect[9] of the joint trial. Here, the trial lasted some three weeks. In terms of the activities testified to, those involving Camperlingo were minimal and took only a small portion of the trial. The crimes alleged to have been committed by the defendants ranged from theft, robbery and fraud to the sale of drugs. All very different in character.

The trial here involved seventeen defendants in five different conspiracies and was a case where "(T)he dangers of transference of guilt from one to

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9. There is of course some overlapping in the two asserted grounds of prejudice.

another across the line separating conspiracies, sub-conscious or otherwise, are so great that no one can really say prejudice to a substantial right has not taken place." Kotteakos v. United States, 328 U.S. 750, 774 (1946). This case is much more akin to Kotteakos (thirty-six defendants and eight conspiracies) than to the five day trial in United States v. Miley, supra, (involving five defendants and two or three conspiracies).[10]

To be tried with sixteen other defendants and have their actions copiously testified to, and to have this testimony submitted to a jury who viewed the case as a single overall conspiracy is an unenviable and unfair position in which to be.[11] The prejudice is obvious.

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10. This is aside from the restrictions on cross-examination, voir-dire, challenges, and summation, which must be imposed to make a multiple defendant trial manageable. Also, it forces the errors or different strategies upon each co-defendant (e.g. Angley's testimony--see Point 3, infra).

11. An analysis of the jury verdict indicates that they were skeptical of Rossi's testimony and only where it was corroborated did the jury convict. At first blush, this seems to weaken the spill-over argument. This is not so. Here, the spill-over involved corroborated testimony (i.e. the Flynn theft corroborated by the stipulation regarding hotels, telephones and airlines, as well as Pearson's and Angley's testimony). Thus, the jury's verdict does not indicate separate treatment of each defendant on trial, but only a corroboration-non-corroboration distinction. Where that corroboration came from and to whom it was applied is the basis of the spill-over argument by appellant.

In conclusion, this Court in United States v. Sperling, 506 F.2d 1323, at 1340-1341 (2d Cir., 1974) stated:

> While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictment against a dozen or more defendants and endeavor to force as many as possible to trial in the same proceeding on the claim of single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top.[12]

Sperling was decided before the superceding indictment was brought and three months before trial. The government itself was aware of the probability of multiple conspiracies,[13] and yet in the face of this Court's warnings, the government chose to proceed in exactly the manner criticized by this Court. In reality, and in light of this Court's decisions, the procedure used by the prosecution was wise. By forcing numerous defendants to trial, the government gets all the benefits and none of the risk. Despite warnings by this Court, it is in the interests of the prosecution to proceed as it did. After conviction an accused still has to get over the requirement of showing multiple conspiracies.

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12. This sentiment has been re-echoed in United States v. Miley, supra, at 2389; and United States v. La Vecchia, supra, at 2761 (concurring opinion, Mulligan, J.).

13. Guerra's exhibit 8 shows this.

In drug cases, this has not been easy under this Circuit's case law. Even if this is established, prejudice would have to be shown. Again, this is not easily done under this Court's decisions. Finally, having shown the above, the accused would then only obtain a new trial. This relief only places the government where it started, with nothing lost; so why not go this route first?

The warning by the Court has no teeth. This is the appropriate case to back up this warning with sanctions. Clearly, there were multiple conspiracies shown and the government was aware of the problem before indictment or trial, and Sperling had been decided several months before. The United States Attorney was or should have been aware of this Court's stated disapproval of the procedure followed. As long as the "warnings" remain "warnings" it can be expected that they will be disregarded. Appellant urges the Court to take action in this case; not only to prevent inconvenience to the Court in deciding the appeal, but also because of the inherent unfairness of the procedure.

POINT II

THE EVIDENCE LINKING CAMPERLINGO TO THE CONSPIRACY WAS INSUFFICIENT.

The evidence in this case established only that Camperlingo made an isolated purchase of cocaine from a member of the conspiracy. This conduct, however illegal, did not make him a member of the conspiracy charged.

Even viewing the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60 (1942); United States v. McCarthy, 473 F.2d 300, 302 (2d Cir., 1972), the most that was established was that Camperlingo purchased two kilos of cocaine from Rossi and later paid Rossi and Coralluzzo with some marijuana. This was a single transaction, despite the fact that final payment was delayed.

Conspiracy indictments for this type of peripheral activity are precisely the sort for which the courts have shown concern.

"The distinction is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in a doctrine is very plain, and it is only

by circumscribing the scope of such all comprehensive indictments that they can be avoided. United States v. Falcone, 109 F.2d 579, 581 (2d Cir.,) aff'd. 311 U.S. 205 (1940).[14]

The Supreme Court of the United States stated in Grunewald v. United States, 353 U.S. 391, 404 (1957):

> Prior cases in this court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.

See also the Court's warning in Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943): "charges of conspiracy are not to be made out by piling inference upon inference thus fashioning . . . a dragnet to draw in all substantive crimes."

The defendant's knowledge of the existence of others and of the conspiracy itself must be clear, not equivocal, and must demonstrate his specific intent to knowingly join the conspiracy. Where conflicting "inferences are equally valid, the defendant is entitled to the one which favors (him)." Chavez v. United States, 275 F.2d 813, 817 (9th Cir., 1960); Miller v. United States, 382 F.2d 583, 587 (9th Cir.,

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14. This applies with equal force to drug conspiracies.

1967). As the court said in Chavez, supra, at 817, the prosecution must show "some knowledge, explicit or implied, in each defendant of the principal purpose of the conspiracy, and some act or action indicating participation therein."

In Direct Sales Co. v. United States, supra, a case involving the sale of morphine through the mail, the defendant who was engaged in repeated large sales of morphine, alleged that he did not intend to join and participate in a conspiracy to distribute morphine. The court found that though "there may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken. Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy."

This case falls squarely within the ruling of Direct Sales. The evidence introduced against Camperlingo does not fairly permit a finding that he knowingly entered an overall conspiracy, or intended to further the aims of the conspiracy. Guerra had the drugs available and Rossi sold them. Certainly, on these facts, to say that Camperlingo knew of the conspiracy would be to pile "inference upon inference." Direct Sales, supra, at 711.

In addition, the evidence fails to establish that Camperlingo participated in any meaningful way in the conspiracy. In United States v. Falcone, supra, it was proved that the defendant sold sugar and material for making beer to members of a distilling ring, with knowledge that the materials would be used for an illegal purpose. The Supreme Court in affirming the opinion of Judge Hand held that a mere purchase or sale does not establish the defendant's knowing entry into an illegal venture, since such a sale does not confirm his "stake in the venture." Moreover, knowledge that goods are to be used for an illegal purpose does not establish that the defendant knew of the conspiracy itself, or willfully associated himself with it. See also United States v. Peoni, 100 F. 2d 401 (2d Cir., 1938).

As Judge Learned Hand said in United States v. Reina, 242 F.2d 302, 306 (2d Cir.,), cert. denied sub nom. Moccio v. United States, 354 U.S. 913 (1957), sales may be evidence of either participation in a conspiracy or random transactions with an independent peddler. The court in Reina found that evidence regarding the source of supply was equivocal and therefore, insufficient for conviction. The evidence is certainly equivocal in this case.

This circuit has recognized that transactions with conspirators can in some instances be a participation in the conspiracy and in others not. The key is the nature of the transaction. United States v. Sperling, 506 F.2d 1323, 1342 (2d Cir., 1974); United States v. De Noia, 451 F.2d 979, 981 (2d Cir., 1971).

> For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the Federal Narcotics laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which such knowledge may be inferred. United States v. Agueci, 310 F.2d 817, 836 (2d Cir., 1962), cert. den. 362 U.S. 974.

In United States v. Aviles, 274 F.2d 179 (2d Cir.), cert. denied, 362 U.S. 974 (1960), the evidence of participation in a conspiracy showed that defendant accepted a delivery of narcotics, and on another occasion pointed out the person to whom a member of the conspiracy was to make a delivery. On this evidence, the court found that there was no clear proof of more than a single delivery to the defendant, and no suggestion of any conversation or other manifestations by the conspirator through whom he participated which might have given him knowledge as to where the drug was obtained. The court further held, in reversing the conviction, that while it may be assumed that the

defendant knew the narcotics were illegally imported, there was insufficient evidence to show that he knew that the person with whom he dealt was an agent for an existing conspiracy.

This Circuit applied the Aviles rule in United States v. De Noia, 451 F.2d 979 (2d Cir., 1971), a case where evidence of the defendant's unity with the purposes of the conspiracy was uncommonly strong. De Noia delivered to a conspirator, at a pre-planned time and place, a bag of heroin; he was fully aware of what he was doing and what the bag contained. Despite this, his conviction for conspiracy was reversed. If this kind of activity cannot sustain a conviction, then certainly Camperlingo's disconnected purchase cannot either.

In United States v. Sperling, 506 F.2d 1323 (2d Cir., 1974), Del Busto and Garcia left a restaurant and went to a 1969 Blue Pontiac, which contained drugs sold by Lipsky to Valentine. Garcia opened the trunk, removed a wrapped package and handed it to Del Busto, who put it in his jacket. They separated. Del Busto got into a car and drove off. He was arrested and the package found to contain cocaine. Garcia returned to the restaurant and left with Valentine and another. They all went to the trunk of the same

Pontiac, and the other person took out a bag of boric acid which turned out to be the substance used to cut the cocaine seized from Del Busto. These activities were held to be insufficient to support the conspiracy charge against Garcia and Del Busto. Id. at 1342. Also, United States v. Stromberg, 268 F.2d 256 (2d Cir. 1959); United States v. Reina, 242 F.2d 302 (2d Cir. 1957), cert. denied sub nom. Moccio v. United States, 354 U.S. 913; See also, United States v. Ford, 324 F.2d 950 (7th Cir., 1963); United States v. Cook, 461 F.2d 906, 910 n.3, (5th Cir., 1972), cert. denied, 409 U.S. 949; United States v. Braico, 422 F.2d 543, 544 (7th Cir., 1970); cf. United States v. Skillman, 442 F.2d 542 (8th Cir., 1972).

Of particular note are those cases dealing with defendants whose alleged participation in the conspiracy consisted of purchasing contraband from a conspirator. In United States v. Koch, 113 F.2d 982 (2d Cir., 1940), the defendant was prosecuted for a narcotics conspiracy. "The only evidence which connected the appellant with (the) conspiracy was that about two months after Mauro (another defendant) received the cocaine from Celli, Koch met Mauro on the street in New York City and, after inquiring if he had some cocaine he wanted to sell and being informed that he had 170 ounces, agreed to buy it for $25 an ounce."

Koch, supra, at 983. The agreement formed at this meeting was consummated several days later. The court found that Koch did not knowingly join the conspiracy to import and dispose of narcotics. All that was proved was that the defendant was an isolated purchaser. It was established that Koch, like Camperlingo, was not a steady purchaser from the conspirators; and it could not:

> . . . be inferred as it was in United States v. De Vasto, 52 F.2d 26, 78 A.L.R. 36, that he knew of the conspiracy and was acting to further its end rather than exclusively his own . . . Here, for aught that appears, the appellant had no knowledge whatsoever as to how Mauro had obtained the cocaine. No doubt he knew that Mauro's possession of it was unlawful and that was true also of the sale to and purchase by him. Koch, supra, at 983.

The facts of Koch are substantially the same as those here. Like Camperlingo, Koch did have contact with criminally culpable persons who were engaged in an illegal conspiracy. But this was evidence of an illegal purchase and was:

> . . . not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest . . . the purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his co-conspirators (citation omitted). It was necessary to the government's case to show that the appellant was in some way associated in the unlawful common

> enterprise to import the drugs and dispose of them unlawfully. United States v. Peoni, 2 Cir., 100 F.2d 401; Muyres v. United States, 9 Cir., 89 F.2d 784. Koch, supra, at 983.

The government in this case has proved only a purchase of heroin by Camperlingo, which is precisely the sort of showing held insufficient for conviction in Koch.

In United States v. Varelli, 407 F.2d 735 (7th Cir. 1969), cert. denied, 405 U.S. 1040 (1972), the Court held that:

> the relationship of buyer and seller, absent any prior or contemporaneous understanding beyond the mere sales agreement, does not prove a conspiracy to sell, receive, borrow or dispose of stolen property, although both parties know of the stolen character of the goods. In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective. Varelli, supra, at 748.

This buyer-seller relationship is the most that can be proved against Camperlingo.

In United States v. Zeuli, 137 F.2d 845, 846 (2d Cir. 1943), Judge Learned Hand stated:

> Although he knew them to be stolen, he bought them without any purpose of securing to the thieves the fruits of their theft; the venture, as far as he was concerned, began as it ended, with the purchase.

The rule set down in Varelli is a reasonable one. In every sphere of business transactions the roles

of buyer and seller are opposite; there is no reason to treat illegal transactions as unique. The seller wants to make the sale for his purposes and the buyer for his. The fact that they may be violating the same statute does not make them "partners" or participants in a joint venture.

For example, a person entering a department store has full knowledge that the salesperson with whom he deals is not the ultimate source of supply of the products sold. There may be several purchases. Still, it is clear that the employees of the store are not involved in a joint venture with the shopper. This example is not frivolous, but roughly reflects the realities of the purchase of drugs. This is exactly the situation presented by this case and it is obvious that Camperlingo was not a member of the conspiracy.

The absence of any evidence involving Camperlingo after this purchase emphasizes the isolated nature of his actions. No word of Camperlingo is heard other than when it relates to this sale. After the sale and payment, Camperlingo is not heard from again, until Festa visits him in Florida. To convict Camperlingo on these facts would extend conspiracy into the area where the possibility of abuse is greatest.

Cases such as United States v. Bynum, 485 F.2d 490 (2d Cir., 1973); United States v. Barrera, 486 F.2d 333 (2d Cir., 1973); United States v. Arroyo, 494 F.2d 1316 (2d Cir., 1974), are distinguishable.

In Barrera, the participation of the defendants was in a single conspiracy to bring 120 kilos of pure heroin into the United States from Europe, inside military footlockers. The conspiracy was such that the participants each played a role in the scheme to import, possess, or sell this single shipment of narcotics. All of which required a finding of knowledge of the overall aims and purposes of the conspiracy.

Arroyo involved a scheme to import from Europe some 80 kilos of European heroin, concealed in a car, and later a second plan to import 176 kilos and a third of 30 kilos. The vastness of this undertaking and the roles played by each participant established the single purpose of those involved. Namely, to bring drugs into the United States, possess and sell them. Each stage was part of an on-going venture.

In Bynum, the evidence showed a venture where the success of all the parts was dependent upon the success of the whole. It was clearly established

that each participant knew the scope of the operation.

Moreover, it was an on-going relationship with clearly defined roles for the participants.

Here, all we have is a single sale of 2 kilos of cocaine. No importation,[15] no packaging, no cutting, and the drugs involved were not of good quality. A finding that this was sufficient evidence to convict Camperlingo of the conspiracy, would mean that any drug sale, involving more than a small amount of drugs, would make the purchaser a part of the seller's conspiracy. This would not make sense and would fly in the face of the realities of the drug trade.

POINT III

THE FAILURE TO GRANT CAMPERLINGO'S MOTION FOR A SEVERANCE WAS A DENIAL OF HIS SIXTH AMENDMENT RIGHTS TO A FAIR TRIAL, BECAUSE OF THE ANTAGONISTIC DEFENSE OF CO-DEFENDANT ANGLEY.

Prior to and throughout this trial, motions for severance were made on behalf of all appellants.

The attorney for co-defendant Angley, rested his defense upon Angley's testimony that he had innocently gone to Florida with Rossi and Coralluzzo.

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15. The drugs came from California.

Upon learning that the true nature of the trip was to steal cocaine from Flynn, he immediately dis-associated himself with the venture and flew back to New York (1857-1861). Counsel for Angley, during summation, again admitted all the operative facts of the Flynn "rip-off" (2429, 2430, 2438-39). Moreover, he pointed out to the jury that Angley had come forward and testified (2439). At no time did the trial court in any way limit the use the jury might make of Angley's testimony.

Where co-defendants present conflicting and irreconcilable defenses and there is danger that from this the jury will unjustifiably infer the guilt of other defendants, then a severance should be granted. See, De Luna v. United States, 308 F.2d 140 (5th Cir., 1962) on reh. 324 F.2d 375 (1963) (dealing with comment by a co-defendant on defendant's failure to take the stand); United States v. Johnson, 478 F.2d 1129, 1132-1133 (5th Cir., 1973). While De Luna, supra, deals with a somewhat different situation, the thrust of its logic applies here.

First, the reference on summation that Angley had testified was tantamount to a comment on the non-testifying defendants' failure to take the stand. This is an analogous situation to that in De Luna. Second, Angley's testimony admitted virtually all of the facts of the Flynn theft.

In asserting his defense, Angley took away from the other defendants any hope of the jury not believing that the Flynn theft occurred as Rossi testified. The Flynn theft was the central act which led to all that followed. Thus, the defense was crippled and Rossi's testimony bolstered.

Angley's defense was clearly antagonistic to the defense of the other defendants.

It is true, that the Flynn theft did not directly involve Camperlingo, but there was still prejudice to him. In its charge to the jury, the Court instructed them that if they found more than one conspiracy had been proved, they must acquit the defendants (2746). The jury's finding of guilt must have been predicated on a finding of a single overall conspiracy. Thus, the jury must have considered any evidence which proved part of the conspiracy as evidence against all the appellants and as evidence which tended to establish Rossi's credibility on other issues as well.

Motions for severance were timely made. During the trial, when Angley testified the prejudice to Camperlingo became obvious.

In United States v. Barrera, 486 F.2d 333, 339 (2d Cir., 1973), De Luca, a co-defendant of

Barrera, rested his entire case on an insanity defense. De Luca's counsel posed certain hypothetical questions to expert witnesses which assumed the truth of some of the government's contentions about the participation of others on trial. This Court stated:

> Although we consider this a close question, especially in light of De Luca's counsel's summation, which conceded De Luca's participation in the conspiracy, we do not find the failure to sever to constitute grounds for reversal. In light of the trial judge's repeated instructions to the jury that the statements of De Luca's counsel were not evidence and that no inferences were to be drawn from the hypotheticals, the denial of the motion to sever was thus not an abuse of discretion. Id. at 339 (emphasis supplied)

If Barrera was close, then the denial of the severance here was clearly an abuse of discretion. Here, Angley's testimony damned the other defendants and no limiting instructions were given as to the permitted use by the jury of his testimony.

A trial court has a continuing duty to grant a severance if prejudice appears from a joint trial. Schaffer v. United States, 362 U.S. 511 (1960); United States v. Deireen, 463 F.2d 1036, 1042 (10th Cir., 1972). Prejudice to Camperlingo from the antagonistic defense of Angley was apparent. The failure to grant the severance denied Camperlingo his Sixth Amendment right to a fair trial.

POINT IV

THE ADMISSION INTO EVIDENCE OF PROOF OF OTHER CRIMES WAS PREJUDICIAL ERROR.

Agent George Festa testified that in May, 1974, Rossi set up contact between Festa and Camperlingo. Festa went to Florida to meet Camperlingo. At this meeting, Camperlingo and Festa discussed the drug trade generally and specifically, Camperlingo referred to the marijuana that he had given to Rossi.[16] This admission tended to corroborate Rossi's testimony about the sale of the two kilos of cocaine to Camperlingo, et al. However, the testimony, the transcript of the tape, and the tape itself, contained much prejudicial and inadmissible evidence. After the tape was played, defense counsel moved to strike those portions of the tape which were not made in furtherance of the conspiracy. The Court denied the motion (1552). The admission into evidence of these portions of the tape requires that Camperlingo be granted a new trial.

First, the conversation dealt with future transactions that had nothing to do with the conspiracy charged and which admitted prior crimes. Second, the

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16. The conversation was recorded by Agent Festa. The government's transcript of the tape is set forth in appellant's appendix (A-312).

conversation placed before the jury the possibility of other crimes not charged, namely, corruption of public officials (i.e. an ex-Judge and a customs official).

The only transaction between Rossi, et al., and Camperlingo was the sale to Camperlingo of the cocaine supplied by Guerra. In this transaction, Camperlingo was the buyer, so that the conversation pertaining to the facility in importing drugs had no bearing on the crime charged. Moreover, the statement by Camperlingo that he had brought in thousands of pounds of drugs into the United States had absolutely nothing to do with the Rossi transaction, nor any other acts charged in this case. It was in fact, an admission of other criminal activity on a grand scale. So too, the talk about possible corruption of officials had nothing to do with the conspiracy charge. Since the date of these activities is unknown, we do not know if they constitute prior similar acts or subsequent (to the sale by Rossi) similar acts. The rule permitting the use of such evidence relates only to prior similar acts, United States v. Brettholz, 485 F.2d 483, 487 (2d Cir., 1973) (and cases cited at p. 487), and not to subsequent ones. The burden of showing when the act occurred should be upon the party asserting its use. This was not done here.

The distinction between prior and subsequent acts is significant. The use of this type of evidence is to show knowledge, intent or design. Prior acts tend to show the foregoing, since they indicate a state of mind in existence prior to and, therefore, probably at the time of the commission of the criminal act charged. With subsequent acts there is not anywhere near the same degree of probability that they reflect the state of mind at the time of the commission of the crime on trial. But see, Hill v. United States, 363 F2d 176, 180 (5th Cir. 1966). So too, the activities referred to in this tape are not similar to the actions of Camperlingo with regard to Rossi. On the tape we have Camperlingo the importer of cocaine, the testimony at trial showed Camperlingo only as a buyer.

Moreover, there is authority in this Circuit that this type of evidence should only be permitted when the defendant first raises the issue of intent or motive or when it is placed in issue at trial, "either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense." United States v. Smith, 283 F.2d 760, 763 (2d Cir., 1960), cert. denied 365 U.S. 851 (1961). Here, the issue of intent

was never raised at trial by either side.

Appellant contends that in this case the entire Festa tape, except the portion relating to the marijuana transaction with Rossi, was not admissible for any valid purpose. But rather, when shorn of rhetoric, it was only admitted to establish disposition, propensity or proclivity to commit the crime charged. This was not proper. Boyd v. United States, 142 U.S. 450 (1895); See, Michelson v. United States, 335 U.S. 469 (1948); United States v. Smith, supra, at 763; United States v. James, 208 F.2d 124 (2d Cir., 1953). Moreover, this type of evidence once allowed into evidence does not lend itself to rectification by curative instruction. United States v. Byrd, 352 F2d 570, 574 (2d Cir. 1965); United States v. Rinaldi, 301 F.2d 576, 578 (2d Cir., 1962); United States v. Rivera, 496 F.2d 952, 953 (2d Cir., 1974).

Finally, even if admissible, the prejudice far outweighed any probative value, and in admitting the entire tape, the Court below committed error. In allowing evidence of the importation of thousands of pounds of drugs and of possible official corruption, very little, if any, probative evidence was added to the government case. These acts do not tend to establish intent, knowledge or motive as regards the crime

charged (i.e. Camperlingo a buyer of cocaine which was already in the country.) The prejudice is so apparent that little discussion is required. Suffice it to say, the jury now viewed Camperlingo through a glass clouded with extraneous criminal activity on a vast scale. Furthermore, the Festa tape was the most powerful piece of evidence tending to corroborate Rossi's testimony about Camperlingo. In light of the jury's verdict, which seemed to reject Rossi's testimony unless corroborated, this tape cannot be viewed as harmless. See, United States v. Rosner, No. 74-2290 (2d Cir., April 29, 1975) slip op. 3245 at 3257.

The Court below should have granted the motion to strike[17] the extraneous portions of the tape. The failure to do so was prejudicial error.

POINT V

THE ADMISSION INTO EVIDENCE OF "MENGRONE" TAPES DENIED CAMPERLINGO A FAIR TRIAL

Rossi testified that he had discussions with Frank Lucas about possible drug sales. As a result of this, Lucas delivered $30,000. This money was in small

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17. While it was not counsel for Camperlingo who so moved, the Court below informed counsel that an objection by one counsel would inure to all (15).

bills. Rossi inferred from this that Lucas did not really have a lot of money, so one or two days later, Rossi decided to just steal the money. A series of conversations ensued between the parties. Those conversations were recorded by the government pursuant to a wiretap order.

The defense characterized these conversations as entirely false, in that they were attempts to put-off the victims of the theft, and everything said on the tapes was untrue. Moreover, these conversations included racial slurs, base comments, and talk of other crimes. The defense argued that the background of how these conversations came about did not permit them to be given to the Jury as reflecting truthful dealings. Nor should the Jury have been permitted to speculate as to what was truth and what was deceit.

However, Rossi testified about the theft and that many of these conversations were false.[18] Thus, the government[19] argued, basically, that it was

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18. The Jury was informed by the Court in its charge of the defense position on the tapes (1752-2777).

19. Throughout the trial, the prosecution exhibited a most grudging attitude toward the revelation of information to defendants (e.g. the Pearson letter, Rossi's receipt of money payments and the delay in checking on wire-taps by government agencies.) So too, on the issue of these tapes, the government's attitude was inappropriate for it knew that these tapes were, in large part, false and misleading.

for the jury to determine what use to make of the tapes, since they were aware of circumstances under which they were made.

The Court adopted the government's position on the threshhold question of admissibility. Appellant contends this was error. However, even if the tapes were technically admissible, the real inquiry was if the prejudice outweighed the probative value. See, United States v. Byrd, 352 F.2d 570, 574 (2d Cir., 1965).

In a joint trial, the balance between probative value and prejudice must be viewed separately as to each appellant. As to Camperlingo, the matter is simple: the tapes had no probative value and there was prejudice[20] created by the tone and nature of the conversations, as well as the discussions of other criminal acts. Camperlingo's motion for severance should have been granted and the failure to do so requires that the conviction be reversed.

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20. Again, it must be remembered that the Court charged the Jury that only if they found a single over-all conspiracy could they convict (2746-47). The Jury must have found one over-all conspiracy. Thus, the acts and declarations of all the appellants were considered as evidence against each appellant, individually (2752).

POINT VI

THE CHARGE TO THE JURY THAT THEY "SHOULD PRESUME THAT A PERSON INTENDS THE NATURAL AND PROBABLE CONSEQUENCES OF HIS ACTS" CONSTITUTED REVERSIBLE ERROR.

Over the objection of defense counsel and the subsequent advice of the prosecutor, the Court below charged the Jury that in making the determination as to whether the requisite knowledge, willfulness and intent were present, they should "presume that a person intends the natural and probable consequences of his acts." The request by defense counsel to modify this language was denied and no curative instructions were given. The issue was clearly presented to the Court by both sides.

This Court has held that where a conspiracy is charged, the government must establish beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute. United States v. Crimmins, 123 F.2d 271 (2d Cir., 1941); United States v. Houle, 490 F.2d 167, 170, 172 (2d Cir., 1973); United States v. De Marco, 488 F.2d 828, 832 (1973); United States v. Alsondo, 486 F.2d 1339, 1341 (1973); United States v. Cangiano, 491 F.2d 906, 909-910 (1974).

Since the defendants were charged with conspiracy to violate the drug laws, the Court should have

instructed the Jury that the defendants could be found guilty on that count only if their specific intent had been to distribute and possess controlled substances in violation of the drug laws. United States v. Cangiano, 491 F.2d 906, 910 (2d Cir., 1974).

However, the Court below charged the Jury on the conspiracy in general terms only. "Specifically, you must find that the defendant knowingly and willfully became a participant in the conspiracy with knowledge of its unlawful purpose." (2750).

> Where a crime requires a general intent . . ., the principle that a person intends the reasonable and probable consequences of his actions has validity. We agree, however, that where a specific intent is required, as in an attempt or conspiracy count, the proper charge requires that the element of actual knowledge be found by the jury. See, United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd 311 U.S. 205 (1940); United States v. Peoni, 100 F.2d 401, 403 (2d Cir., 1938). See also United States v. Lusterino, 450 F.2d 572, 574 n.1 (2d Cir., 1971) United States v. Barash, 365 F.2d 395, 402-403 (2d Cir., 1966); United States v. Cangiano, supra, at 910.

The vice of such a charge (presuming intent from acts) is that the Jury may erroneously believe that it is appropriate to infer specific knowledge or intent solely from the doing of a particular act; or that the occurrence of the act shifts the burden

of proof on knowledge or intent to the defense; or that they should determine whether a reasonable man, under the same circumstances, would have had the requisite intent or knowledge, rather than whether the defendant actually had it. See, United States v. Barash, supra, at 402-403.

Here, the clear objection to the charge combined with the total absence of any curative or modifying charge requires that the conviction be reversed.

The evidence of Camperlingo's involvement was not overwhelming and the sufficiency of the proof linking him to the conspiracy was and is being attacked both at trial and on appeal.

In light of the above, a reversal of the conviction is required. Cf. United States v. Cangiano, supra, at 910-11.

POINT VII

OTHER ERRORS

The failure to give timely instructions to the jury of the permitted use of the evidence about the marijuana transactions.

The United States Attorney started this case under the theory that the marijuana transactions were part of the conspiracy and the evidence of those transactions was admitted for that purpose. Subsequently,

the government altered its position, and the evidence of the marijuana transactions were admitted only on intent, motive knowledge, etc., and not as part of the conspiracy. The jury was not so instructed until the charge. To have permitted this evidence to be used as part of the conspiracy throughout the trial was error. This was not cured by the belated instruction, because the jurors had this evidence before them for too long a period of time for the charge to affect their view of what this evidence meant.

The admission of the Joseph Lepore statement violated Camperlingo's right to a fair trial

Agent Lough testified that he asked Joseph Lepore why he was involved with this type of people. Lepore answered, "Because I'm stupid, that's why". This admission clearly implicated everyone in the trial. Especially, on the conspiracy charge. This is exactly the situation dealt with in Bruton v. United States, 391 U.S. 123 (1968). Moreover, limiting instructions are not, in this type of situation, effective. Bruton v. United States, supra, at 132-36.

There was no sufficient, independent, non-hearsay basis for the admission of co-conspirator hearsay against Camperlingo

Rossi testified that Capotorto, Bertolotti and Thompson came to New York to buy cocaine. They

told him that they, along with Camperlingo, had pooled their money to make the purchase. This was very damaging and constituted the only direct evidence of Camperlingo's stake in the purchase of the cocaine. The other evidence, really, only tends to establish the existence of the marijuana transaction. This was not a sufficient basis to permit the use of the statements of the co-conspirators. United States v. Geaney, 417 F.2d 1116 (2d Cir., 1969), cert. denied sub. nom. Lynch v. United States, 397 U.S. 1028.

POINT VIII

THE COURT'S RESTRICTION OF CROSS EXAMINATION OF THE ISSUE OF THE PARENTS INVOLVEMENT WAS ERROR.

During the trial, the testimony clearly indicated that Rossi's parents home had been used to store drugs. On cross examination it was brought out that some of the drugs were stored in Rossi's father's bedroom safe. The Court, however, severely limited cross examination in the area, as well as the area of whether Rossi made any deal on behalf of his parents. While there was extensive impeachment of Rossi, and the Jury verdict seems to indicate that they reviewed Rossi's testimony with suspicion, still the limitation of cross examination was error. The protection of his family was a most compelling reason

to lie. If this was the case, the Jury should have known of it.

POINT IX

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT ADOPTS ALL RELEVANT POINTS CONTAINED IN CO-APPELLANTS' BRIEFS.

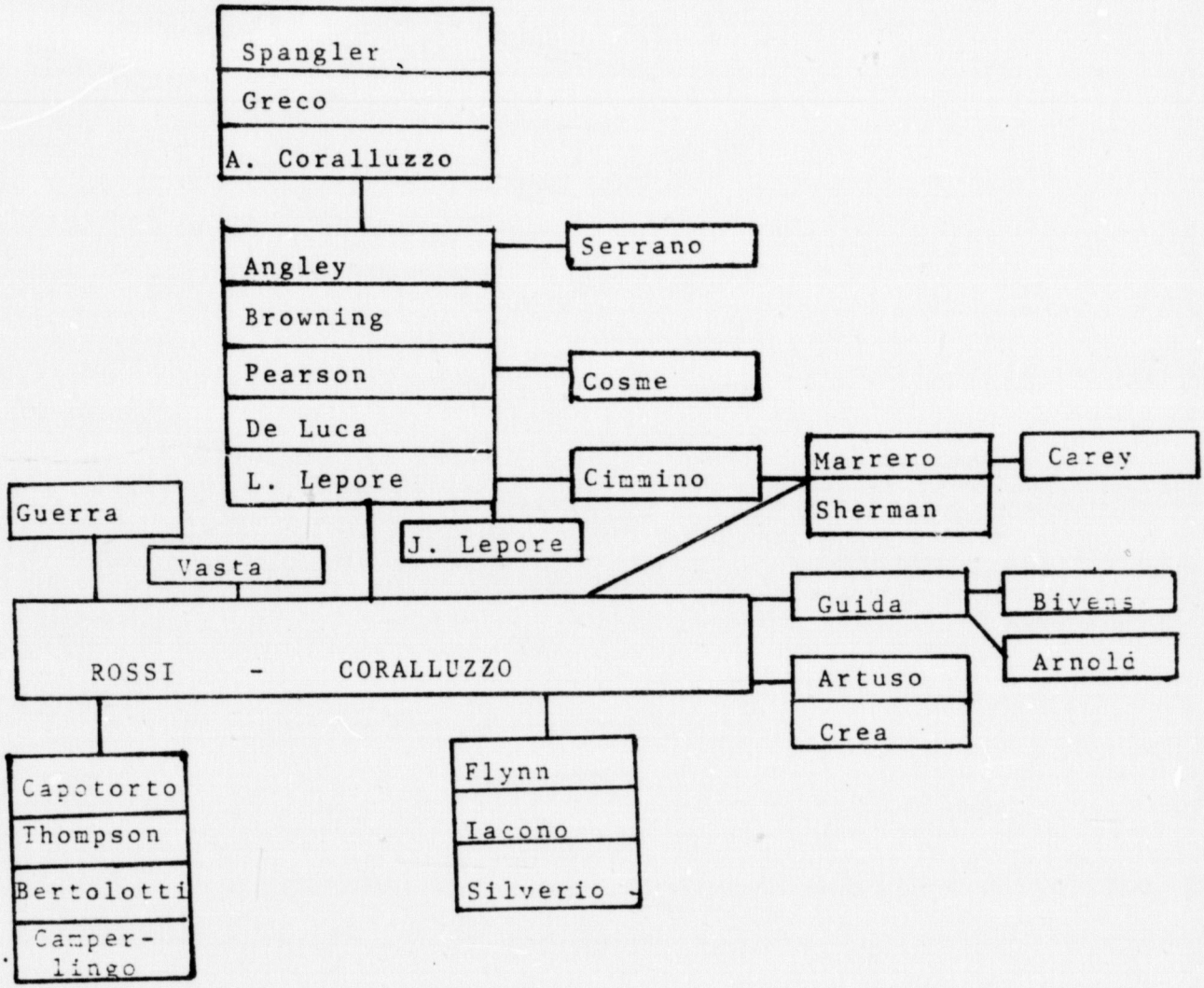
CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR IN THE ALTERNATIVE A NEW TRIAL GRANTED.

Respectfully submitted,

GOLDBERGER, FELDMAN & BREITBART
Attorney's for Appellant

J. JEFFREY WEISENFELD
On the Brief.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Iacono
Silverio

ADDENDUM

U. S. v. Camperlengo

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 7 day of June, 1975 at No. U.S. Courthouse, S.I. deponent served the within Brief upon U.S. Attorneys the Appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 7 day of June 1975

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973